

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA RUTHERFORD)	
Claimant)	
VS.)	
)	
CREDIT UNION OF AMERICA)	
Respondent)	Docket No. 259,041
AND)	
)	
CUMIS INSURANCE SOCIETY INC.)	
Insurance Carrier)	
)	

ORDER

Respondent requests review of a preliminary order entered by Administrative Law Judge Nelsonna Potts Barnes dated November 21, 2000.

ISSUES

1. Whether the claimant met with personal injury by accident.
2. Whether the claimant's alleged accidental injury arose out of and in the course of her employment with the respondent.
3. Whether the claimant gave timely notice of her alleged accident as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant testified that on March 8, 2000, she went into the file room to retrieve a file which was hard to get out and that after she returned to her desk she noted that her shoulder was hurting. The claimant further testified that she advised her supervisor that her shoulder hurt and that it had been fine until she had gone in to get the file. The next day she told her supervisor that her shoulder was still hurting and she wondered whether it was bursitis. The following Monday the claimant's shoulder pain had increased and she advised her supervisor she was going to call the doctor. She did not request that the

employer provide the doctor because at that time she didn't consider the incident a work-related injury and she was still uncertain whether she simply had bursitis.

The claimant then called her personal physician and discussed her arm pain with his nurse. In response to a question regarding whether she was in an accident, the claimant replied no. However, she testified that she then advised the nurse that the nearest thing she could figure out was when she had pulled a file in the file room. The claimant's personal physician referred the claimant to Dr. Murphy. Dr. Murphy performed an examination of the claimant and scheduled her for an MRI. Dr. Murphy treated the claimant for symptoms related to a C6-7 cervical disc, however, her x-rays and the MRI study were negative. The claimant's treatment included conservative treatment, physical therapy and epidural injections.

Shortly, after the claimant began treatment with Dr. Murphy, she requested that the respondent allow her to use the Federal Family Medical Leave Act program. The claimant testified that the human resources' staff suggested that she file under the company disability policy but she thought she would get better before the time necessary to qualify under that policy. Over her course of treatment, she would work variable hours on an intermittent basis pursuant to the doctor's restrictions. The claimant testified that during the course of her treatment the more she worked the more her shoulder would hurt and her arm would go numb to the point that she could not hold a pen. The varied work hours pursuant to the doctor's restrictions continued through September.

The claimant testified that she never felt she had an accident because her definition of an accident would be a car accident or falling down a flight of stairs. She testified that it wasn't until her benefits under the Federal Family Medical Leave Act program were about to expire that a credit union member advised her that the incident with the file might have been a workers compensation injury.

The claimant admitted that from March through September when she would bring in leave slips from the doctor she never discussed the case as work-related. The contemporaneous medical records from her personal physician dated March 13, 2000, indicated that the claimant had called regarding left arm pain and the record specifically notes that she had no injury. That same day when the claimant saw Dr. Murphy, he specifically noted no history of trauma. The claimant could not explain why the doctors failed to mention the file cabinet incident in their records because she was adamant that she had discussed the incident with her doctor's nurse as well as Dr. Murphy.

The first reference in the medical records regarding an injury at work is in the notes of Dr. Mueller dated August 16, 2000. It was noted that the patient was lifting a file cabinet or moving a file cabinet at work and developed pain at that time. This contemporaneous note was taken when the claimant saw Dr. Mueller for a cervical steroid epidural. This reference to file cabinets does not exactly conform to the claimant's original testimony that

she was just removing a file from the cabinet rather than moving or lifting the entire file cabinet.

The respondent's human resource manager testified that when she investigated claimant's allegations, the claimant's immediate supervisor did not recall any conversation regarding the claimant hurting her shoulder while pulling a file. On cross-examination, it was noted that the immediate supervisor never denied such a conversation occurred rather he did not recall the conversation. The immediate supervisor did not testify.

The respondent points to the inconsistency of the claimant's actions with regard to whether the accident arose out of and in the course of employment. The inconsistencies listed by the respondent include: (1) the supervisor did not recall any conversation about the incident with the file; (2) the claimant did not make any requests for medical treatment to her employer; (3) the claimant sought medical treatment on her own; (4) claimant's medical expenses were paid by her group health insurance carrier; (5) claimant never made any request for those expenses to be paid by her employer; (6) claimant also met with the human resources' staff and discussed taking disability but never addressed the shoulder problem as work-related; (7) that when claimant would present her work status forms prepared by Dr. Murphy she never made mention of any work-related accident; (8) claimant requested and was granted leave from work at various times pursuant to FMLA; (9) the contemporaneous medical records of Drs. Santos and Murphy reflect no injury and no history of trauma; and, (10) claimant did not file a workers compensation claim until her FMLA benefits had expired.

Initially, determination of this matter is dependent upon the credibility accorded the witnesses. If the claimant's testimony that she notified her immediate supervisor and that she did not define accident as an incident such as pulling a file is accepted, then the rest of her actions are consistent. The Administrative Law Judge believed the claimant's testimony and made the specific finding in her order that the claimant timely notified her immediate supervisor of her injury. In addition, this matter was plead as an accident occurring on or about March 8, 2000, and each and every day thereafter. The uncontradicted testimony of the claimant was that with an increase in her hours worked her symptoms would worsen. This is indicative of aggravations or mini-traumas which qualify as work-related accidents for which there would also be timely notice.

The Board finds, where there is conflicting testimony contained in the record, it is significant that the Administrative Law Judge had the opportunity to observe the testimony of the witnesses. Finding that the claimant had notified her immediate supervisor of the accident, the Administrative Law Judge had to believe the claimant's testimony. The Board finds, in this instance, that some deference should be given to the Administrative Law Judge's conclusions because she had the opportunity to assess the witnesses' credibility when they testified. Therefore, the Board concludes the Administrative Law Judge's preliminary hearing order should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 21, 2000, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2001.

BOARD MEMBER

pc: Andrew E. Busch, 1540 N. Broadway, Suite 205, Wichita, KS 67214
Wade A. Dorothy, 13420 Santa Fe Trail Dr., Lenexa, KS 66215
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director